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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF LOS ANGELES, WEST DISTRICT**

TWENTIETH CENTURY FOX FILM CORPORATION, a Delaware Corporation, and FOX 21, INC., a Delaware Corporation,

Plaintiff,

v.

NETFLIX, INC., a Delaware Corporation,

Defendant.

And Related Cross-Claims.

Case No. SC126423

**[REDACTED FOR PUBLIC FILING]**

**TWENTIETH CENTURY FOX FILM CORPORATION AND FOX 21, INC.'S OPPOSITION TO NETFLIX, INC.'S MOTION FOR SUMMARY ADJUDICATION**

**Filed concurrently with:**

**[1] Response Separate Statement of Undisputed Facts;**
**[2] Declaration of Molly M. Lens;**
**[3] Objections to Evidence**

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Judge: Hon. Marc D. Gross
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## OPPOSITION TO NETFLIX'S MOTION FOR SUMMARY ADJUDICATION

## I. INTRODUCTION[1]

After metamorphosing from a movie-rental business into a Hollywood studio, Netflix began furiously hunting for experienced entertainment executives. Because many of the most senior and valuable executives were bound by fixed-term contracts with Fox and other Hollywood studios, Netflix devised a plan to systematically induce key executives to breach their contracts. Netflix poached executive after executive by communicating secretly with them, enticing them with promises of more money, providing free legal counsel to them, and fully indemnifying them in the event of litigation. Following this classic poaching blueprint, in 2016, Netflix willfully induced two valuable Fox executives, Tara Flynn and Marcos Waltenberg, to breach their fixed-term employment agreements with Fox and join Netflix. After Fox sued Netflix for inducing those contract breaches, Netflix's tortious campaign continued unabated—Netflix targeted and offered employment to [redacted] additional individuals with full knowledge they were under contract with Fox. Indeed, Netflix openly admits that, unless restrained by this Court, it will not stop inducing executives to breach their fixed-term employment agreements with Fox.

Under black-letter California law, Netflix's brazen campaign to poach Fox's executive workforce by inducing key executives to break their Fox employment contracts indisputably constitutes tortious interference and unfair competition under Section 17200 of the California Business and Professions Code. Netflix tracks fixed-term-contract employees whom Netflix hopes to steal from their existing employers, seduces them with tantalizing promises of higher compensation, and then secures their breaches with written indemnification agreements ensuring that their breaches cause no financial consequence to the employees. "Disrupting" Fox's contracts by knowingly and deliberately inducing their breach is unlawful in this state. *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 55 (1998). Netflix cannot escape that rule based on a claimed special need to assemble a "competitive" workforce at breakneck

[1] This brief refers to (i) Plaintiffs Twentieth Century Fox Film Corporation and Fox 21, Inc. together as "Fox" or "Plaintiffs"; (ii) Fox's Motion for Summary Judgment as "Fox MSJ"; (iii) Netflix's opening brief as "Netflix MSA"; and (iv) Fox's Statement of Additional Undisputed Material Facts that defeat Netflix's MSA as the "RSUF." Unless otherwise indicated, all emphasis is added and all citations and internal quotations are omitted.

speed—California law unambiguously prohibits certain methods of "competing," including by inducing rival employers' employees into breaching their fixed-term agreements. There is no exception in the law for Netflix.

Fox accordingly seeks an injunction under Section 17200 to prohibit Netflix from continuing its illicit poaching campaign. As Fox showed in its own Motion for Summary Judgment, the relevant facts are undisputed. The record conclusively establishes that Netflix interfered with Fox's fixed-term employment contracts with Waltenberg and Flynn, and plans to continue to induce the breach of fixed-term contracts between Fox and its employees. And California's Business and Professions Code expressly authorizes injunctions as a remedy for threatened future Section 17200 violations. Because there can be no reasonable dispute that Netflix's conduct constitutes tortious interference, the only meaningful question should be whether Netflix's affirmative defenses preclude injunctive relief. As demonstrated in Fox's summary judgment motion, Netflix's defenses have no merit.

Yet on this record, Netflix remarkably insists that it not only is entitled to prevail on Fox's unfair-competition claims, but is entitled to summary adjudication in its favor. According to Netflix, its motion "boils down to a single legal issue": "Should Fox be permitted to use the UCL to obtain injunctive relief against Netflix broader than any it could legally obtain against its employees themselves?" But that question has nothing at all to do with Fox's unfair-competition claim. Fox is not trying to achieve "indirectly what it cannot obtain directly"—*i.e.*, to prevent its employees from choosing on their own to breach their employment contracts. Fox's claim is not about its employees' conduct, but *Netflix's* conduct—specifically, its openly admitted campaign to *target*, *solicit*, and *induce* current Fox employees to breach their fixed-term contracts. California law unmistakably authorizes such relief. Netflix's effort to recast Fox's claim into a dispute over Fox employees' rights, rather than Netflix's violation of its own distinct legal obligations, is no defense to its illegal actions.

Netflix also errs in asserting that it is free to poach Fox's employees because (according to Netflix) many of Fox's fixed-term contracts violate California's prohibition against employment contracts with terms exceeding seven years. Netflix contends that because Fox and its employees

have agreed to *consecutive* contracts that result in employment for longer than seven years, Fox has violated California's seven-year rule. But of course nothing in California law bars an employee from electing to work for one employer for more than seven years pursuant to consecutive but *separate* contracts. Which is what happens at Fox: Netflix has identified no employee that has worked at Fox for more than seven years absent a new and superseding agreement, negotiated at arms-length. In each case, the subsequent agreement reflects material changes, and the employee has a meaningful choice to end his or her employment at Fox rather than enter into a new agreement. Under California law, those successive but independent contracts are considered separately for purposes of the seven-year rule. Netflix's Motion for Summary Adjudication should be rejected; it cannot be permitted to freely interfere with the valid contracts of Fox's entire fixed-term workforce.

## II. RELEVANT UNDISPUTED FACTUAL BACKGROUND

### A. Fox's Practice Of Entering Into Fixed-Term Employment Agreements.

California's Labor Code has long endorsed employment agreements with a specified durational term. Like countless employers across California and the country, Plaintiffs, two of the premier entertainment-content producers and distributors in Hollywood, negotiate and enter into fixed-term employment agreements with a select group of individuals who are especially valuable to the business. These agreements bind both Fox and its employees for specified durations—but Netflix has identified no Fox employee who has ever been bound under a single contract for longer than seven years, even inclusive of all options.[2] Fixed-term contracts reward key employees with job security, while allowing Fox to maintain a stable workforce, and

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[2] Lui Decl., Ex. 5 (Fox's fixed-term agreements); Netflix SUF App'x B. Any reference to two Fox employees, [redacted], who are currently employed under agreements that, together with all amendments, contemplate a period of employment exceeding seven years (*see* Lui Decl. Ex. 5 at 1851-62 [redacted], would not provide the basis for a seven-year rule violation, because neither has yet worked at Fox under a single contract for seven years. *Id.* Netflix impliedly recognizes as much by nowhere arguing to the contrary based on the unique circumstances of their current outlier contracts. But even if those two agreements constituted a seven-year rule violation, they would not provide a basis for Netflix to freely interfere with hundreds of other Fox fixed-term employment contracts that in no sense implicate the seven-year rule.

structure its organization as a continuous body, without sudden, unexpected, and disruptive departures.[3]

**B. Netflix's Poaching Scheme.**

After rapidly transforming its movie-by-mail rental business into a studio that produces and distributes content over the internet, Netflix devised and launched a blitzkrieg campaign to poach entertainment executives from Fox and other Hollywood studios. Although many such executives—especially the more senior and valuable ones—were bound by fixed-term contracts with their existing employers, *see* Part II.A, *supra*, Netflix created a systematic plan for poaching these executives, including: targeting key executives employed by other studios; communicating with them secretly, often through personal e-mail accounts; offering more money; providing free legal counsel; and offering to indemnify them in litigation with a target's employer.[4] In fact, Netflix maintained an *actual poaching blueprint*—[redacted][5]

**C. Netflix's Tortious Interference With Marcos Waltenberg's And Tara Flynn's Fixed-Term Employment Agreements With Fox.**

In 2016, Netflix willfully induced two valuable Fox executives, Tara Flynn (former Fox Vice President of Creative) and Marcos Waltenberg (former Fox Vice President of Promotions), to breach their fixed-term employment agreements with Fox. Netflix's poaching spreadsheet reflects its 2016 understanding that Flynn's "[redacted]"[6] Netflix nonetheless targeted, solicited, and hired Flynn when she still had more than one year remaining on her Fox contract.[7] Netflix likewise targeted, solicited, and hired Waltenberg, knowing full well he was still under contract with Fox.[8] To induce Flynn and Waltenberg to breach their contracts, Netflix offered both substantial raises, complete indemnity, and free legal representation—all before they breached their contracts with Fox.[9]

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[3] *See, e.g.*, RSUF ¶ 27.
[4] RSUF ¶¶ 3, 4, 5, 6, 7, 8, 9, 10, 12, 18, 19, 20, 25, 26.
[5] RSUF ¶17 (Lens Decl., Ex. 58 (NFLX0001173)).
[6] *Id.*
[7] RSUF ¶¶ 15, 16, 17, 21, 22, 24.
[8] RSUF ¶¶ 3, 4, 5, 9, 10, 12.
[9] RSUF ¶¶ 6, 7, 8, 18, 19, 20.

For example, to induce the skittish Waltenberg into breaching, [redacted].[10] After making an official offer, the lead recruiter warned others at Netflix that to close their target, Waltenberg would "[redacted].[11] And [redacted]" they did. Netflix introduced Waltenberg to Netflix's top lawyers—General Counsel David Hyman, as well as Employment Counsel Cheryl Guerin—"[redacted]"[12] Netflix hired an outside law firm, Pennington Lawson LLP, to represent Waltenberg,[13] and promised to "[redacted]"[14]

Likewise, there is no doubt that Netflix was *the* "continuous and active" force that caused Flynn to breach. *Osborn v. Irwin Mem'l Blood Bank*, 5 Cal. App. 4th 234, 253 (1992). After deciding Flynn would be a valuable employee, the question at Netflix was not whether to induce her breach, but "[redacted]"[15] Thus, after reviewing a copy of her Fox contract, Netflix offered to double Flynn's salary.[16] The next day, on August 9, Netflix connected Flynn with Netflix's legal bench—including Guerin and outside counsel Lisa Lawson—to guide her exit from Fox.[17] As with Waltenberg, Netflix provided a written indemnification guarantee.[18] Flynn,

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[10] *See id.* ¶¶ 5, 8 (Lens Decl., Ex. 19 (Welch Tr.)).
[11] *See id.* ¶ 6 (Lens Decl., Ex. 19 (Welch Tr.), Ex. 27 (NFLX0026297)).
[12] *See id.* ¶ 6 (Lens Decl., Ex. 17 (Waltenberg Tr.)).
[13] *See id.* ¶¶ 6, 7.
[14] *See id.* ¶ 6; *see also* Lens Decl. Ex. 22 at 222.
[15] *See* RSUF ¶ 17; *see* Lens Decl. Ex. 56 at 452; *see also id.* Exs. 53, 55.
[16] *See* RSUF ¶¶ 15, 20; *compare* Lens Decl. Ex. 44 (Flynn Agreement) at 411 (providing for a salary of [redacted] per annum [redacted] and providing for a salary of [redacted] per annum [redacted]), *with* Lens Decl. Ex. 48 (Flynn Offer Letter) at 427 [redacted]
[17] RSUF ¶¶ 18, 19 (Lens Decl., Ex. 61 (Depo. Ex. 95)).
[18] *See id.* ¶ 18 (Lens Decl., Ex. 60 (Depo. Ex. 311)).

on vacation at the time, agreed to give notice to Fox when she returned to work.[19] Flynn did so on August 17, 2016—15 months before the expiration of the term of her contract.[20] Fox advised Flynn that doing so constituted a breach of her agreement, and demanded that Netflix cease interfering with its contracts.[21] Netflix refused, providing Flynn with the same sort of "[redacted]" that it had provided Waltenberg.[22] For example, Guerin continued to communicate with Flynn both directly and through Lawson: to Flynn, these notes of encouragement "[redacted]"[23]

On September 1, 2016, Fox sent a cease-and-desist letter to Netflix's General Counsel, detailing Netflix's inducement of both Waltenberg and Flynn to breach their employment agreements with Fox, and demanding that Netflix cease its tortious interference with Fox's employment agreements.[24] Netflix refused, openly admitting that it plans to continue to induce the breach of fixed-term contracts between Fox and its employees.[25] And Netflix has in fact continued its poaching unrestrained by or during this litigation. For example, since the outset of this case, Netflix admits that it has offered employment to [redacted] individuals under contract with Fox,[26] tacking on an agreement to indemnify [redacted] of these individuals if they were willing to breach their Fox contracts.[27] In total, between 2016 and 2019, Netflix's contract-breach inducements have caused [redacted] Fox employees to leave the company before the expiration of their fixed-term contracts.[28] Netflix's poaching will continue indefinitely—unless finally restrained by this Court. In fact, Netflix's conduct is by no means limited to Fox—to the contrary, Netflix is

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[19] *See id.* ¶ 19 (Lens Decl., Ex. 63 (NFLX0085793)).
[20] RSUF ¶ 21.
[21] *Id.* ¶ 22 (Lens Decl., Ex. 68 (NFLX0001159)).
[22] RSUF ¶ 6 (Lens Decl., Ex. 27 (NFLX0026297)).
[23] *Id.* ¶ 22 (Lens Decl., Ex. 70 (NFLX0085790)).
[24] *Id.* ¶ 22 (Lens Decl., Ex. 68 (NFLX0001159) (September 1, 2016 letter from Fox outside counsel Daniel Petrocelli notifying Netflix that Fox was not waiving its rights under Flynn Agreement)).
[25] *Id.* ¶¶ 25-26.
[26] *See id.* ¶ 25.
[27] *Id.*; *see also id.* ¶¶ 6, 18, 19 (Lens Decl., Ex. 29 (Netflix's Nov. 28, 2018 Resp. to Fox 21's Special Interrogatories, Set Five) at 280 [redacted].
[28] *See* RSUF ¶ 26.

tortiously interfering with contracts across California.[29]

**D. Procedural History.**

Fox commenced this lawsuit on September 16, 2016, asserting two claims against Netflix for inducing breach of Flynn's and Waltenberg's contracts and—as relevant to this Opposition—one claim for unfair competition in violation of Section 17200 of the California Business and Professions Code. Fox's unfair-competition claim alleges that Netflix has unlawfully competed with Fox by "soliciting, recruiting, and inducing Fox employees to breach their Fixed Term Employment Agreements with Fox," and that, unless restrained, Netflix will continue to unlawfully interfere with Fox's fixed-term employment agreements.[30] Fox seeks an injunction prohibiting Netflix from continuing to knowingly solicit, recruit, and induce Fox employees to breach their fixed-term employment agreements.[31]

In 2019, Netflix and Fox filed competing dispositive motions.[32] Fox moved for summary judgment on all three of its claims, seeking judgment as a matter of law that: (i) Netflix tortiously induced Waltenberg to breach his contract with Fox (Count I); (ii) Netflix tortiously induced Flynn to breach her contract with Fox (Count II); and (iii) Netflix's ongoing scheme to tortiously interfere with Fox's fixed-term contracts is an unlawful business practice that should be enjoined (Count III).[33] Fox also moved for summary adjudication on certain of Netflix's affirmative defenses, showing that the Waltenberg and Flynn agreements are not void as against public policy or unconscionable.[34] Finally, Fox moved for summary judgment on Netflix's cross claims for

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[29] RSUF ¶¶ 25-26; *see also* Lens Decl., Ex. 78 (Netflix's Further Resp. to Special Interrogatory No. 7) at 567-87 (between date of Fox's Complaint and April 14, 2019, Netflix offered employment to [redacted] additional individuals employed by entities other than TCFFC or Fox 21 pursuant to fixed-term contracts that had not yet expired at the time Netflix made the offer); *id.* at 587-598 (during same time period, Netflix hired [redacted] additional individuals employed by entities other than TCFFC or Fox 21 pursuant to fixed-term contracts that had not yet expired at the time Netflix hired them); *see also* Lens Decl., Ex. 79 (Netflix's Resp. to Special Interrogatory No. 50) at 611-14 (identifying [redacted] additional individuals recruited by Netflix while subject to an employment agreement with an employer other than TCFFC or Fox 21, whom Netflix offered to or agreed to indemnify).

[30] Lens Decl., Ex. 91 (Fox Compl.) ¶¶ 43, 45.

[31] *Id.* ¶ 45 & Prayer for Relief.

[32] Lens Decl., Ex. 92 (Netflix MSA); *id.* Ex. 93 (Fox MSJ).

[33] *See* Lens Decl., Ex. 93 (Fox MSJ) at 722-32.

[34] *Id.* at 732-37.

unfair competition and declaratory judgment, demonstrating that because the Waltenberg and Flynn agreements are lawful, Netflix's claims cannot succeed.[35]

Netflix, for its part, sought judgment as a matter of law only on Fox's unfair-competition claim (Count III), arguing that "Fox is legally precluded from obtaining injunctive relief preventing Netflix from soliciting, recruiting, and inducing Fox employees to leave Fox."[36] As explained at length below, Netflix's argument is premised on an inaccurate recitation of the relevant legal principles and blatant mischaracterization of Fox's claim. Because Netflix admittedly plans to continue interfering with critical Fox executives' valid fixed-term contracts—and injunctive relief is the only way to prevent that tortious interference—Netflix's Motion should be denied (and Fox's Motion should be granted).

## III. ARGUMENT

Netflix does not deny that the fundamental elements of Fox's third cause of action—"Unfair Competition in Violation of Business and Professions Code §§ 17200"—are satisfied here. To the contrary, Netflix applauds itself for interfering with Fox's fixed-term employment contracts with Waltenberg and Flynn, and celebrates its plans to continue inducing breaches of fixed-term contracts between Fox and its employees.[37] Netflix does so even while tacitly admitting that California's Business and Professions Code expressly authorizes injunctions as a remedy for threatened future Section 17200 violations.[38]

Netflix nevertheless insists that Fox is legally barred from obtaining injunctive relief, for two reasons. *First*, Netflix asserts that many of Fox's fixed-term employment contracts violate California's seven-year rule, thereby permitting Netflix to freely disrupt them.[39] *Second*, Netflix

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[35] *Id.* at 737-38.
[36] *See* Lens Decl., Ex. 92 (Netflix MSA) at 695.
[37] *See generally* Lens Decl., Ex. 92 (Netflix MSA).
[38] *Id.*; *see also* Cal. Bus. & Prof. Code § 17203 (titled "Injunctive Relief—Court Orders") ("Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments ... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter."); *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 179 (1999) (private plaintiffs seeking relief under the UCL are entitled to an injunction).
[39] Lens Decl., Ex. 92 (Netflix MSA) at 695-97, 700-01, 709-12.

contends that Fox's fixed-term employment contracts contain injunctive-relief provisions that cannot be enforced against Fox *employees*, which in turn means that Fox cannot seek injunctive relief against *Netflix* for tortiously inducing Fox employees to breach their contracts.[40] Neither contention has merit.[41]

### A. None Of Fox's Fixed-Term Employment Contracts Violates California's Seven-Year Rule.

There is no dispute that California law permits and encourages fixed-term "contracts for general services ... [up] to seven calendar years." *De Haviland v. Warner Bros. Pictures*, 67 Cal. App. 2d 225, 232 (1945). Indeed, "California Labor code *explicitly contemplates* that an employer[] and employee will enter an employment contract for a 'specified term.' *See* Cal. Labor Code §§ 2922, 2925." *Allied N. Am. Ins. Brokerage Corp. of Cal. v. Woodruff-Sawyer*, 2005 WL 2354119, at *8 n.13 (N.D. Cal. Sept. 26, 2005). To facilitate such agreements, California law includes an entire statutory framework governing the use of fixed-term contracts. California law defines such contracts, *see* Cal. Lab. Code § 2922; specifies the circumstances under which they may be terminated by the employee without breach, *see id.* § 2925; specifies circumstances under which they may be terminated by the employer without breach, *see id.* § 2924; defines the outer limits of their enforceability, *see id.* § 2855; and contrasts the obligations owed to and by at-will employees from those owed to and by fixed-term employees, *see id.* §§ 202, 2923, 2926, 2927.

Applying that framework, California courts have repeatedly interpreted, enforced, and recognized the validity of these contracts, frequently at the insistence and for the benefit of the employee. *See, e.g., CRST Van Expedited, Inc. v. Werner Enters., Inc.*, 479 F.3d 1099, 1106 (9th Cir. 2007); *Touchstone Television Prods. v. Superior Court*, 208 Cal. App. 4th 676, 683 (2012). As one leading decision observed just after Section 16600 was enacted in its current form to prohibit employment contracts that restrain trade, the statute limiting fixed-term employment

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[40] *Id.* at 695-96, 697-99, 703-08, 710-12.

[41] "Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case." *Dunkin v. Boskey*, 82 Cal. App. 4th 171, 183 (2000).

contracts to seven years—now § 2855(a)[42]—both "benefits" employees and promotes the "public interest," given the prevalence of such agreements:

> It is safe to say that the great majority of men and women who work are engaged in rendering personal services under employment contracts. Without their labors the activities of the entire country would stagnate. Their welfare is the direct concern of every community.

*De Haviland*, 67 Cal. App. 2d at 235. Nowhere did *De Haviland*—or any other decision before or since—suggest that Section 16600 is violated by employment contracts with fixed terms no greater than seven years.

Tacitly acknowledging the lawfulness of such agreements, Netflix mischaracterizes the term of Fox's contracts as "*more* than seven years,"[43] in violation of § 2855(a).[44] In fact, Netflix has identified no Fox employee that has served under a fixed-term contract, even considered with all term-extending options, for longer than seven years.[45] Rather, Fox's contracts are typically structured with an initial term of one or two years, with additional one- or two-year options that Fox may exercise to extend the term.[46]

Netflix does not dispute the actual terms of Fox's contracts, but instead contends that Fox's contracts are "consecutive and overlapping," resulting in contractual employment relationships that ultimately last longer than seven years. According to Netflix, "[redacted]"—more than "[redacted]"—have ended up with "[redacted]"[47] Asserting that these contracts are "*per se* unenforceable,"[48] Netflix contends that Fox's

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[42] Cal. Lab. Code § 2855(a) ("[A] contract to render personal service ... may not be enforced against the employee beyond seven years from the commencement of service under it.").
[43] *See, e.g.*, Lens Decl., Ex. 92 (Netflix MSA) at 700-01 (describing Fox's alleged "Imposition of Contracts for Personal Service in Excess of Seven Years" and including chart falsely indicating that Fox bound its employees to "Contract Start" and "Contract End" dates spanning longer than seven years); *accord id.* at 709-10.
[44] *Id.* at 709-10 (emphasis added).
[45] Lui Decl., Ex. 5 (Fox's fixed-term agreements); Netflix SUF App'x B.
[46] RSUF ¶ 28; *see also, e.g.*, Lens Decl., Ex. 46 (Flynn Nov. 19, 2013 agreement) at 420, ¶ 1 (initial two-year term with a two-year option); Lens Decl. Ex., 14 (Waltenberg Dec. 9, 2014 agreement) at 153, ¶ 1 (initial two-year term with a two-year option).
[47] Lens Decl., Ex. 92 (Netflix MSA) at 701, 710.
[48] *Id.* at 696-97.

unfair-competition claim is "fatally overbroad" because it effectively seeks to enforce them by injunction.[49]

Netflix is obviously wrong. Nothing in California law prohibits employers and employees from agreeing to consecutive—but separate—employment contracts. Fox and its employees did exactly that. Each Fox employee whose tenure at Fox exceeds seven years is employed pursuant to a new and superseding agreement, negotiated at arms-length.[50] In each case, the subsequent agreement reflects material changes, including, for example, with regard to the employee's title, compensation, bonus, and scope of responsibilities.[51] And critically, in each case, the employee is offered a "meaningful choice" to end his or her employment at Fox rather than enter into a new agreement.[52] *See Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*, 55 Cal. 4th 223, 247 (2012). In fact, some Fox employees did *not* enter into new fixed-term agreements upon expiration of their contracts, instead continuing at the company in an at-will position.[53] Nothing

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[49] *Id.* at 710.

[50] Lui Decl., Ex. 5 (Fox's fixed-term agreements).

[51] *See generally id.* Fox employee [redacted] *Id.* at 2475-93. Fox Employee [redacted] *Id.* at 2635-46. Subsequent agreements contain material changes even in cases where employees execute new agreements to continue in the same role. For instance, when her contract of employment expired January 1, 2016, Fox executive [redacted] *Id.* at 3517-41. Fox employee [redacted] *Id.* at 4791-801.

[52] Lui Decl., Ex. 5.

[53] RSUF ¶ 29; *see, e.g.*, Lens Decl. Ex. 5 (Breen Tr. 114:20-122:20) (Fox employee [redacted]

in the record so much as hints at any Fox retaliation for that change in status: to the contrary, Fox subsequently entered into new fixed-term agreements with several such employees on terms favorable to those employees.[54]

In theory, when Fox wanted to continue its relationship with a particular employee beyond seven years, it might simply have sought an amendment extending the length of the employee's prior agreement. Fox has not done so. Instead, Fox has consistently continued any longer-than-seven-year employment relationship by negotiating, documenting, and executing a new, self-contained contract that explicitly "supersede[s] any and all prior agreements" between the employee and Fox.[55] *See* Cal. Civ. Code § 1636 (court must ascertain to extent possible the parties' objective intent "as it existed at the time of contracting"); *Orozco v. Clark*, 705 F. Supp. 2d 1158, 1168 (C.D. Cal. 2010) (in applying Cal. Civ. Code § 1636, "a court must first look to the

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[redacted]); *id.* Ex. 3 (Hanneman Tr. 74:13-75:9, 203:7-205:25), *id.* Ex. 83 (FOX0049953), *id.* Ex. 84 (FOX0049954), *id.* Ex. 85 (FOX0049957), Lui Decl., Ex. 5 at 1864-68 (Fox employee [redacted]); Lens Decl. Ex. 8 (Roca Tr. 66:11-69:22) ([redacted]).

[54] SUF ¶ 30. Of particular relevance to this case, Waltenberg's initial agreement spanned from [redacted]. Lens Decl., Ex. 86 (Depo. Ex. 26). That agreement expired on [redacted], with no follow-on contract. *Id.*, Ex. 8 (Roca Tr. 66:11-69:22). When Waltenberg ultimately entered into a new contract, effective January 1, 2015, he was promoted to Vice President, received a [redacted] annual salary increase, and a car allowance and bonus eligibility commensurate with his title. *Id.*, Ex. 14 (Waltenberg Agreement). Likewise, [redacted] Lui Decl., Ex. 5 at 1864-69, Lens Decl., Ex. 87 (FOX0049959). [redacted] Lui Decl., Ex. 5 at 1883-88. Similarly, there was no retaliation when [redacted] Lens Decl., Ex. 88 (FOX0056076), *id.* Ex. 96 (Ward Tr. 34:15-24, 46:6-11, 47:8-13), Lui Decl., Ex. 5 at 4829-33. [redacted] Lui Decl., Ex. 5 at 4842-47.

[55] *See generally* Lui Decl., Ex. 5. Fox's employment agreements stand in stark contrast, for example, to a situation where a series of options is negotiated at the outset of an employment relationship to allow an employer to extend the term of the *original* personal services contract beyond seven years. In that case, Cal. Civ. Code § 1642 and other canons of construction would treat the original contract and its options as a single agreement that cannot exceed seven years.

plain meaning of the agreement's language"); *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992) ("If contractual language is clear and explicit, it governs."). Netflix's citation to Fox's use of mid-contract-term amendments (*see, e.g.*, Netflix MSA at 15) only underscores the point: even inclusive of all amendments, it is undisputed that no Fox employee's tenure under a single contract has exceeded seven years.[56]

Under California law, those resulting contracts are not extensions of prior contracts, but rather new and superseding agreements. *See Mitchell v. Am. Fair Credit Ass'n, Inc.*, 99 Cal. App. 4th 1345, 1353-54 (2002) ("When a material term in a contract is altered or added, a *new* agreement between the parties has been reached."); Cal. Civ. Code § 1642 (multiple contracts should be "taken together" only when they "relat[e] to the same matters, between the same parties, and [are] made *as parts of substantially one transaction*"). And California law precludes enforcement "beyond seven years" from the commencement of personal services only under "a contract"—not under a series of *contracts*. Cal. Lab. Code § 2855(a). Successive but independent contracts must thus be considered separately for purposes of whether Fox procured services in violation of the seven-year rule.

Netflix's position reduces to the untenable proposition that two independent contracts must be treated as one under California law merely because they are consecutive—"back-to-back," in Netflix's words[57]—even though the second contract (i) was negotiated and signed after the first; (ii) contains terms materially different from the first agreement; (iii) does not incorporate or depend on the terms of the first contract; and (iv) applies to a different time period. On that remarkable theory, no employee in California may lawfully work uninterrupted for a single company for longer than seven years—according to Netflix, Kareem Abdul-Jabbar's storied 14-year career with the Los Angeles Lakers was a violation of California law. To state the proposition is to refute it.

Netflix entirely fails, moreover, to advance a workable alternative employment structure. Were Fox to negotiate a successive employment contract only at the precise termination date of

[56] *See generally* Lui Decl., Ex. 5 (Fox's fixed-term agreements).
[57] Lens Decl., Ex. 92 (Netflix MSA) at 700-01, 707-10.

the initial agreement, each employee would be (rightly) anxious in the months preceding the expiration of a contract that she would no longer have a contract-guaranteed job come termination date. And if negotiations took several days or weeks, as arms-length contract negotiations often do, the employee (even if she ultimately chooses to sign a new contract) would lack contract-guaranteed benefits and salary for an indeterminate negotiations period. Netflix cannot justify a legal rule that would require a break in employment every seven years, and thus deprive a significant portion of the California workforce of fundamental elements of job security.

Unsurprisingly, no California court has endorsed Netflix's argument. In *De Haviland*, the Court of Appeal acknowledged the "public reason" Section 2855 makes seven years "the maximum time" an employment contract may deny employees "the right to change employers or occupations": to "protect employees" from "improvident contracts" that undermine their ability to "move upwards." 67 Cal. App. 2d at 234-35, 237. But where, as here, no contract denies any employee the right to leave Fox after seven years if she "deem[ed] it necessary or advisable," *De Haviland*, 67 Cal. App. 2d at 235, no Section 2855 violation exists.

The court in *Manchester v. Arista Records, Inc.*, 1981 U.S. Dist. LEXIS 18642 (C.D. Cal. Sept. 15, 1981), even more directly rejected Netflix's theory that Section 2855 prohibits employers and employees from entering successive, independent contracts for longer than seven years in the aggregate. In *Manchester*, singer Melissa Manchester entered into an agreement with Arista Records in 1973 that provided for an initial term of 18 months with four one-year options granted to Arista. *Id.* at *2-3. In 1976, while she was still subject to the 1973 agreement, Manchester granted Arista an additional one-year option to be exercised at the completion of the 1973 agreement as consideration for Arista's agreement to pay a judgment against her in another lawsuit. *Id.* at *4. Because of multiple "suspensions" of the 1973 agreement, the 1973 agreement did not reach its final year until 1980. *Id. at* *3, *14. When Arista announced that it would exercise its one-year option under the 1976 agreement, Manchester filed suit, requesting a declaratory judgment that her employment agreement with Arista Records was unenforceable under Section 2855. *Id.* at *1.

The court denied Manchester's motion. *Id.* at *20. The pivotal issue, the court explained,

was whether the 1976 agreement was "a one-year extension of the 1973 agreement" or, conversely, "an independent contract"—which would not violate Section 2855. *Id.* at *17-18. In holding that the 1976 agreement was an "independent contract," the *Manchester* court rejected the theory Netflix advances here, because "[i]t would effectively prevent an employee from entering into a new contract with his or her current employer until after the completion of all obligations between them." *Id.* at *18-19. "The better course," the court observed, "is to consider the circumstances surrounding the formation of the new contract in each situation," and "if the latter contract was entered into toward the end of the first contract, it should be treated as a separate agreement for purposes of § 2855." *Id.* Because Manchester's 1976 agreement was "an integrated agreement that differed in several material respects from the 1973 agreement," *id.* at *19-20, the court held that the 1976 agreement was "a separate agreement" that had to be analyzed independently under Section 2855. *Id.* at *20.

The same analysis applies here. As detailed above, the evidence conclusively establishes that each of Fox's employment agreements was separately negotiated after its preceding agreement commenced, each differs materially from its prior agreement in multiple ways, and each functions as a fully integrated contract. Each existing agreement thus must be analyzed independent of its preceding agreement, and because Netflix has identified no Fox employee that has worked under an existing agreement in excess of seven years, Fox has not violated Section 2855. *See id.* at *18.

Netflix, for its part, relies almost entirely on a non-binding, nearly twenty-year-old federal-court authority, *De La Hoya v. Top Rank, Inc.*, 2001 WL 34624886 (C.D. Cal. Feb. 6, 2001). But *De La Hoya*, if anything, supports *Fox's* position. The court in *De La Hoya* held that the repeated extension of a contract between a professional boxer, Oscar De La Hoya, and Top Rank, a promoter, violated the seven-year rule. But critically, unlike this case, Top Rank represented to both state and federal courts that its *original* 1992 agreement with De La Hoya was "the foundation of its right to De La Hoya's personal services," and had been "amended" and "extended" through 2002, rather than "superseded" by any new contract. *Id.* at *12. In fact, Top Rank and De La Hoya both described mid-term amendments to their contracts as "modify[ing]

their relationship" under the original agreement and extending the "original term" of their initial agreement. *Id.* at *2. In other words, there was ample evidence that both parties treated the various amendments to the contract as "a single package." *Id.* at *12.

To be sure, the *De La Hoya* court observed that parties cannot "evade" Section 2855 through a "midterm amendment" to "modify their relationship" without "providing for a period of freedom or otherwise relieving the talent of its existing obligations." *Id.* at *12. But that observation simply restates the principle that merely amending a contract—without superseding the prior contract and thereby allowing the employee an opportunity to negotiate for materially different terms—will not restart the seven-year "clock" under Section 2855. In contrast to *De La Hoya*, neither Fox nor its employees treat multiple consecutive contracts as a "single package." To the contrary, any new agreements are separately negotiated after the formation of the initial agreements and expressly supersede any prior agreements.[58] Each employee has the freedom and opportunity to test the job market,[59] and any employee who elects to continue employment with Fox voluntarily enters a new, separate, materially different agreement with Fox.[60] The seven-year rule has no application here.

The implications of Netflix's argument are particularly perverse. Netflix, a competitive rival to Fox, is asking the Court to invalidate hundreds of contracts to which Netflix is not a party, without allowing the affected Fox employees to be heard, and without any indication that Fox employees *want* their contracts invalidated. If Netflix's position were adopted, scores of Fox

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[58] *See generally* Lui Decl., Ex. 5.

[59] [redacted] *See* RSUF ¶ 31.

[60] Netflix's reliance on *De La Hoya* suffers from additional flaws, including that *De La Hoya* is based on legal reasoning that California courts have since rejected. Specifically, in holding that a mid-term amendment did not restart the clock, *De La Hoya* relied on the Legislature's decision not to enact proposed amendments in 1985 and 1986 that would have expressly "permit[ted] new or superseding contracts to restart the seven-year period." *Id.* at *12-13. The California Supreme Court has since expressly disapproved appellate decisions that divine intent from "failed proposed amendments." *See Eastburn v. Reg'l Fire Prot. Auth.*, 31 Cal. 4th 1175, 1183-84 (2003). Moreover, the legislative history cited in *De La Hoya* is expressly limited to the phonorecord industry—which is not at issue here. *See* 1987 Cal. Stat. ch. 591 § 2 (S.B. 1049) ("The Legislature does *not* intend that the provisions of this act support *any* inference about the meaning of Section 2855 of the Labor Code prior to the operative date of this act *or with respect to any industry other than the phonorecord industry*.").

employees would suddenly find themselves deprived of the employment security for which they bargained.[61] Needless to say, there is no legal, equitable, or principled basis for that outcome. *See Dowell v. Biosense Webster*, 179 Cal. App. 4th 564, 566, 573 (2009) (affirming denial of injunction seeking to bar defendant from using noncompetes with "any current or former California-resident employee," because injunction would "affect agreements with persons not before the Court and whose interests are not represented in this litigation").

### B. Injunctive Relief To Prevent Netflix's Tortious Interference With Fox's Valid Contracts With Current Employees Is Wholly Appropriate.

Netflix's next argument focuses on the injunctive-relief provisions in Paragraph 10 of Fox's employment agreements (the "Paragraph 10 Provisions"). According to Netflix, those provisions cannot be enforced against any Fox employee carrying out routine business functions,[62] and thus "Fox also is not entitled to an injunction against Netflix's recruiting and hiring of such employees."[63] In other words, Netflix's theory is that "Fox cannot enjoin Netflix from recruiting its employees unless Fox also is entitled to legally enjoin those employees directly."[64]

Netflix is incorrect. To start, the Paragraph 10 Provisions are irrelevant to the injunctive relief Fox seeks here. The Paragraph 10 Provisions [redacted].[65] But Fox has not sought injunctive relief against breaching

[61] Netflix's argument deliberately ignores, of course, that employees desire the protections offered by fixed-term contracts, *see, e.g.*, *Khajavi* v. *Feather River Anesthesia Med. Grp.*, 84 Cal. App. 4th 32, 38-39 (2000) ("employee who has a contract for a specified term"—unlike other employees—"may not be terminated prior to the term's expiration based on an honest but mistaken belief that the employee breached the contract"), and may not want to work for a company like Netflix, which proudly boasts a strategy of terminating adequate workers and reports a strikingly high annual-termination rate. *See* Lens Decl., Ex. 94 (FOX0072638), *id.* Ex. 95 (Bjelajac Tr. 136:15-20).

[62] Lens Decl., Ex. 92 (Netflix MSA) at 702-08.

[63] *Id.* at 703.

[64] *Id.* (citing *Beverly Glen Music, Inc. v. Warner Commc'ns, Inc.*, 178 Cal. App. 3d 1142 (1986)).

[65] The Paragraph 10 Provisions state, in relevant part [redacted]

employees, including Waltenberg and Flynn.[66] Rather, Fox seeks to enjoin *Netflix* from systematically and tortiously interfering with the existing contracts of current, *non*-breaching Fox employees. That requested relief has nothing to do with whether a Fox employee can choose to breach her contract and work for another employer *absent* tortious inducement to breach by some third party. In other words, Fox is not seeking to restrict the mobility of any employee via injunction: Fox simply seeks to enjoin a third party's active, ongoing, and tortious interference with valid employment agreements.[67] In fact, if the employment agreements did not contain the Paragraph 10 Provisions, Fox's unfair-competition claim would be *precisely* the same. The claim thus does not depend in any way on the validity of those provisions.[68]

Netflix also mischaracterizes the injunction Fox seeks, claiming Fox is trying to broadly enjoin "Netflix from interviewing, recruiting, or hiring Fox's fixed term employees."[69] As

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[redacted]." Lui Decl., Ex. 5 at 14.

[66] *See generally*, Lens Decl., Ex. 91 (Fox Compl.).

[67] Section 16600, of course, "does not affect limitations on an employee's conduct or duties *while* employed." *Angelica Textile Servs., Inc.* v. *Park*, 220 Cal. App. 4th 495, 509 (2013) (emphasis in original). Rather, "section 16600 has consistently been interpreted as invalidating any employment agreement that unreasonably interferes with an employee's ability to compete with an employer *after* his or her employment ends." *Id.* (emphasis in original); *see also Edwards* v. *Arthur Andersen LLP*, 44 Cal. 4th 937, 946-47 (2008) (discussing post-employment restraints on trade). Indeed, as recognized by the seminal *De Haviland* opinion, fixed-term contracts—by definition—"restrain" an employee's ability to change employment with impunity during the specified term. *See De Haviland*, 67 Cal. App. 2d at 235.

[68] That said, the injunctive-relief provision in Paragraph 10 of Fox's employment agreements does not in fact violate Section 16600. On its face, the provision "restrain[s]" no one, *see* Section 16600—it merely reserves the right "[redacted]" a remedy that may be available to Fox. *Id.* Specifically, Paragraph 10 states that Fox [redacted] *Id.* Section 2855 of the California Labor Code permits injunctions (enjoining an employee from working for a competitor during the specified term) only for employees providing special, unique, and/or intellectual services—whether Fox would actually be entitled to obtain such an injunction would be for the Court to decide and would entail analysis of the nature of the particular employee's services, among other considerations. Netflix's conclusory assertion that all such provisions in all of Fox's contracts are invalid is patently meritless. Moreover, to the extent that the injunctive relief provision were found to be unenforceable with respect to any particular employee (based on the Court's determination that such employee could not be enjoined pursuant to Section 2855), the result would be to sever and/or not enforce that particular provision in the otherwise enforceable contract. *See* Cal. Civ. Code § 1599.

[69] Lens Decl., Ex. 92 (Netflix MSA) at 710; *accord id.* at 702-03.

Netflix well knows but deliberately omits, what Fox seeks to enjoin is Netflix's intentional conduct in "soliciting, recruiting, and inducing Fox employees *to breach* their Fixed Term Employment Agreements with Fox."[70] The injunction Fox seeks would not preclude Netflix, for example, from hiring a Fox employee who breached his contract with Fox without any inducement by Netflix.

Likewise erroneous is Netflix's reliance on *Beverly Glen Music, Inc. v. Warner Communications, Inc.*, 178 Cal. App. 3d 1142 (1986), which did not even involve a Section 17200 claim. In *Beverly Glen*, Anita Baker, a then-unknown singer, signed a recording contract with recording studio Beverly Glen. *See id.* at 1143. Two years into her recording contract, Warner Communications offered Baker a better deal. *See id.* at 1143-44. Baker accepted and informed Beverly Glen that she would no longer perform under her contract. *See id.* at 1144. Beverly Glen then sued Baker to enjoin her from performing for any other recording studio. The court denied the injunction, ruling that Baker was immune from restraint under § 2855 because she was not guaranteed annual compensation of at least $6,000 (a requirement for obtaining a § 2855 injunction for contracts entered into before 1993). *Id.* Unable to enjoin Baker herself from working for Warner, Beverly Glen then sued Warner, seeking to enjoin it from employing her. *Id.* The appellate court affirmed the trial court's denial of that injunction, agreeing that "what one was forbidden by statute to do directly, one could not accomplish through the back door." *Id.* The appellate court reasoned that because the court had already ruled that Beverly Glen was "prohibited from enjoining Ms. Baker from performing herself," it could not "enjoin all those who might employ her and prevent them from doing so, thus achieving the same effect." *Id.* at 1145.

This case differs from *Beverly Glen* in multiple key respects. No court here has ruled Fox is legally barred from enforcing its contractual rights and enjoining breaching employees from

[70] *Id.* Ex. 91 (Fox Compl.) ¶ 45.

accepting employment elsewhere. And *Beverly Glen* did not involve a systematic campaign to induce mass breaches of contracts. Nor did it involve Section 17200's proscription of unlawful business practices. Nothing in *Beverly Glen* holds or suggests that California courts are powerless to enjoin a systematic effort to tortiously interfere with and disrupt ongoing employment relationships subject to lawful fixed-terms contracts.

Since *Beverly Glen* was decided in 1986, it has been cited in only three published appellate opinions, none of which supports Netflix's position here. Each cites *Beverly Glen* only for the straightforward proposition that specific enforcement of personal services contracts may constitute involuntary servitude prohibited by the Thirteenth Amendment. *See Moss v. Superior Court*, 17 Cal. 4th 396, 411 n.11 (1998); *Woolley v. Embassy Suites, Inc.*, 227 Cal. App. 3d 1520, 1533 (1991); *Barndt v. Cty. of Los Angeles*, 211 Cal. App. 3d 397, 404 (1989). For the reasons already discussed, that proposition has no relevance to the relief Fox seeks here. Under Section 17200, Fox is entitled to enjoin Netflix's openly acknowledged campaign to engage in active, ongoing, and tortious interference with Fox's valid employment agreements.

## IV. CONCLUSION

For the foregoing reasons, Netflix's Motion for Summary Adjudication should be denied.

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